No. 75-123

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

HORACE E. AND EDITH B. NICHOLS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner [1] seeks review of the decision below disallowing his claimed deduction of a fee which he paid to have his name placed on the ballot in the 1968 Georgia Democratic primary election.

The pertinent facts are as follows: Petitioner was appointed to fill an existing vacancy as Associate Justice of the Supreme Court of Georgia. The ap-

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[1] References to "petitioner" are to Horace E. Nichols. Edith B. Nichols is a party because she filed a joint return with her husband for the year at issue.

pointment was effective from November 15, 1966, until the next general election on November 5, 1968. In May, 1968, petitioner qualified to run in the Democratic primary election for the unexpired portion of his term—November 6, 1968, through December 31, 1968—and for the following six-year term beginning January 1, 1969. In order to have his name placed on the primary ballot as a candidate, petitioner was required to pay an $1,800 filing fee.[2] Seventy-five percent of this assessment was used to cover the cost to the Democratic party of Georgia's primary election, and the remaining 25 percent was subsequently used to finance a 1970 primary run-off election (Pet. App. A-3).

Petitioner was unopposed in the primary and general election and was nominated as the Democratic candidate and elected in the general election. On his 1968 income tax return, he deducted the $1,800 filing fee on the ground that it was a state tax deductible under Section 164 of the Internal Revenue Code of 1954 (Pet. App. A-3 to A-4). On audit, the Commissioner disallowed the deduction. The Tax Court upheld the Commissioner's determination (Pet. App. A-10 to A-19) and the court of appeals affirmed *en banc* (Pet. App. A-1 to A-8).

Section 164 of the Internal Revenue Code of 1954 provides for the deduction of certain enumerated taxes. It also provides that any state, local or foreign tax incurred in carrying on a trade or business

[2] The fee was paid prior to this Court's decision in *Bullock* v. *Carter*, 405 U.S. 134.

or profit-making activity may also be deducted from income. However, this latter aspect of Section 164 merely reiterates Sections 162 and 212 of the Code, which respectively permit the deduction of ordinary and necessary expenses incurred in carrying on a trade or business or for the production or collection of income.

The filing fee in question does not fall within the five enumerated taxes in Section 164.[3] Thus, the filing fee can only be deductible if it was incurred in carrying on a trade or business or profit-making activity within the meaning of either Section 162 or 212.[4]

[3] These are:

(1) State and local, and foreign, real property taxes.
(2) State and local personal property taxes.
(3) State and local, and foreign, income, war profits, and excess profits taxes.
(4) State and local general sales taxes.
(5) State and local taxes on the sale of gasoline, diesel fuel, and other motor fuels.

[4] Petitioner correctly asserts (Pet. 5-6) that *Nichols* v. *United States*, 223 F. Supp. 709 (N.D. Ga.) and *Campbell* v. *Davenport*, 362 F.2d 624 (C.A. 5), held that fees similar to that paid by the petitioner here were deductible as a tax within the purview of Section 164. But the decisions in those cases were rendered prior to the amendment of Section 164 by the Revenue Act of 1964, 78 Stat. 40. Under the former provision, state taxes were generally deductible. Thus, if the filing fee were determined to be a state tax, Section 164 then allowed a blanket deduction for non-federal taxes. Since the fees in those cases were held to be taxes which did not fall within the non-deductible exceptions of Section 164, the deductions were allowed. Here, however, the primary election filing fee does not fall into the enumerated categories of deductible taxes specified in the present version of Section 164.

The courts below correctly held that this case is controlled by *McDonald* v. *Commissioner*, 323 U.S. 57. There, the taxpayer accepted a temporary appointment by the Governor of Pennsylvania to be a judge of the Court of Common Pleas of Luzerne County. Subsequently, the taxpayer stood for election to the judgship to which he had been appointed. In order to get the support of the political party, he was obligated to pay to the party an amount which he had been assessed. After losing the election, he sought to deduct the assessment as well as his other campaign expenses. In holding that the expense was not deductible as an expense incurred in carrying on a trade or business, the plurality of this Court stated that the disallowance of the deduction of campaign expenses had been consistently reflected by legislative history, court decisions, Treasury Regulations, and Treasury administrative practice.

The considerations set forth in *McDonald* for not allowing the deduction are applicable here whether the filing fee be viewed as a campaign expense or mandatory filing fee. Both the expense here and in *McDonald* were incurred in seeking election to public office. As the plurality noted in *McDonald*, the relationship between expenses incurred in securing election to public office and tax deductions involves issues of far-reaching importance which should be addressed by Congress. However, Congress has thus far enacted no provision allowing the type of deduction which petitioner seeks. Instead, Congress has adopted a general policy that the Treasury should

remain neutral in this area.[5] *Cammarano* v. *United States*, 358 U.S. 498; *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849 (C.A. 10). There is accordingly no statutory basis for petitioner's claimed deduction.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5] See, *e.g.*, Section 162(e)(2) (nondeductibility as business expenses of amounts contributed to political campaigns or efforts to influence legislation); Section 170(c)(2) (denying charitable contribution deductions with respect to gifts to political campaigns or organizations engaged in influencing legislation); Section 271 (providing that a taxpayer may not deduct as bad debts amounts owed to him by a political party); Section 276 (disallowing deductions for certain indirect contributions to political parties); Section 501(c)(3) (denying tax-exempt treatment to any organization which devotes a substantial part of its activities to influencing legislation or participating in political campaigns); 26 U.S.C. (Supp. III) 642(a)(3) (providing that trusts and estates are not entitled to a tax credit for political contributions); Section 4945(a), (d)(1) and (e) (imposing a tax on the expenditures of a private foundation made for the purpose of influencing legislation).

26 U.S.C. (Supp. III) 41 and 218, which allow an alternative income tax credit or deduction for political contributions are a limited exception to this rule. They limit the credit or deduction to maximum dollar amounts.

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